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In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BLACKSTONE COMPANY

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), if its hostility to an employee's protected union activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities.

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In the Supreme Court of the United States

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No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BLACKSTONE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-10a) is reported at 685 F.2d 102. The decision and order of the National Labor Relations Board (App. C, *infra*, 16a-20a) and the decision of the administrative law judge (App. C, *infra*, 21a-77a) are reported at 258 N.L.R.B. 945.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 11a-15a) was entered on October 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any

person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]:
 * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.
 * * *

STATEMENT

1. Respondent manufactures and distributes wooden windows, doors and related products for use in the construction industry (App. C, *infra*, 23a). In May 1978, the union¹ began an organizing campaign at respondent's East Brunswick, New Jersey, plant, where respondent employs approximately 40 production workers, warehousemen, and drivers (*id.* at 23a). The union initially held meetings with small numbers of employees at local restaurants and at private residences (*id.* at 23a-24a). Then, on September 8, 1978, the union stepped up its efforts, beginning with an organizing meeting at a local restaurant, which was attended by a number of drivers, including Robert Nagy and Kevin Moffat. During this meeting, several employees signed authorization cards, and shortly

¹ "The union" refers to Teamsters Local Union No. 35, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

thereafter an in-plant committee was formed to distribute literature and cards to respondent's employees (*id.* at 25a).

Within a few days of the September 8 meeting, respondent's Vice President, Stanley Swerdlick, summoned employees Kevin Moffat and Richard Rizzo to his office and questioned them concerning the employees' organizing activities. Swerdlick conveyed the impression that respondent had engaged in surveillance of the September 8 meeting, by accurately naming the employees who had attended the meeting, and by concealing the source of his information (App. C, *infra*, 24a, 26a-28a). During this same period, Swerdlick told employee Robert Nagy that "there was a 'union fever' which had not been cured," and, when Nagy protested that he was not involved in the organizing campaign, Swerdlick responded that "everyone was involved" (*id.* at 49a). Swerdlick also told another employee that respondent would be forced "out of business" because it would be "unable to meet union demands" (*id.* at 29a). Finally, Swerdlick warned employee Kevin Moffat, who was the driver with the next to least seniority, that if a union were brought in there might be a loss of business and "the new employees would be the first ones laid off" (*id.* at 28a).

On September 21, respondent discharged Kevin Moffat, informing him that he was being laid off for lack of work (App. C, *infra*, 63a). On September 28, the union filed a representation petition with the Board (*id.* at 25a). Shortly thereafter, when employee Dafcik complained to Vice President Swerdlick that he was a better worker than some of the other drivers, yet was receiving less pay, Swerdlick replied,

“let’s get this business of the union over with” and then he would be able to take care of Dafcik (*id.* at 30a-31a). During the same period, Swerdlick also told employees Nagy and Dafcik that if the union came into Blackstone and it “‘goes down everybody goes down’” (*id.* at 32a).

In September 1978, respondent posted a notice promising employees additional paid holidays and a new profit sharing pension plan (App. C, *infra*, 36a-39a). In late October, Swerdlick told employee Friewald that his friends Nagy and Dafcik were involved with the union and warned Friewald to stay away from them (*id.* at 34a). In November, approximately two weeks before the election, respondent’s president met with employees and repeated the promises contained in the September notice (*id.* at 47a-49a).²

On February 27, 1979, respondent’s president notified Robert Nagy that he was being suspended pending an investigation for theft. A police investigation failed to uncover any proof of theft (App. C, *infra*, 49a-58a). However, on March 2, Nagy was discharged, allegedly for stealing windows from respondent (*id.* at 58a).

2. Based on the foregoing facts, the administrative law judge (ALJ) found that respondent had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by interrogating employees about their union activities; by conveying the impression of surveillance; by threatening plant closure and loss of employment if

² On November 21, the union lost the representation election. The union filed timely objections to the election with the Board, contending that respondent had interfered with the election process (App. C, *infra*, 22a, 68a). Those objections were not before the court of appeals (App. A, *infra*, 2a-3a n.1) and thus are not at issue in this petition.

employees engaged in union activities; by warning employees to refrain from union activities and not to associate with union adherents; by refusing to consider requests for wage increases until after the union question was resolved; and by promising a profit sharing plan and additional paid holidays to induce employees not to support the union (App. C, *infra*, 26a-49a). In addition, the ALJ found that respondent had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging employees Kevin Moffat and Robert Nagy because of their union activity (App. C, *infra*, 49a-67a). The ALJ recommended that the Board order that the two employees be reinstated with back pay (*id.* at 70a-73a).

In reaching his conclusion that the discharges of Moffat and Nagy were unlawful, the ALJ expressly relied (App. C, *infra*, 51a) on the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).³ In *Wright Line* the Board explained that, in determining whether an employer's action violated Section 8(a)(3), it would first require the General Counsel to show that the employee's protected activities were a "motivating factor" in the employer's decision to take adverse action against the employee. If the General Counsel made this showing, the Board—following this Court's decision in *Mt. Healthy City*

³ Board Member Jenkins would not have applied the *Wright Line* test in this case. In his view, since the ALJ found the discharges here to be pretextual, it was unnecessary to resort to the *Wright Line* analysis (App. C, *infra*, 20a).

School District Board of Education v. Doyle, 429 U.S. 274 (1977)—ruled that the employer could avoid an unfair labor practice finding if it proved, by a preponderance of the evidence, that the adverse action would have been taken even if the employee had not engaged in protected activities. 251 N.L.R.B. at 1089.

Here, after reviewing the evidence, the ALJ found that the General Counsel had sustained his burden of establishing that the discharges of Moffat and Nagy were unlawfully motivated. The ALJ noted respondent's extensive violations of Section 8(a)(1) of the Act, which included threats of discharge and closedown made by Vice-President Swerdlick to both men, as well as Swerdlick's warning to another employee to avoid Nagy because he was involved with the union (App. C, *infra*, 51a-52a, 63a). The ALJ further found that the respondent had failed to rebut the General Counsel's showing, because its evidence did not establish that Moffat was discharged for poor work performance or that Nagy was discharged for theft, as respondent claimed (*id.* at 52a-62a, 64a-67a).

With respect to Moffat's discharge, the ALJ discredited two critical evaluations of Moffat's performance prepared by fellow employees and offered by respondent in support of its defense (App. C, *infra*, 65a). Although the ALJ credited a third critical evaluation by senior employee Nemeth, he found Nemeth's report "diminished by the remaining support to Respondent's case," which he characterized as "unreliable, vague, and suspect, and almost nonexistent" (*id.* at 67a). The ALJ therefore found that respondent's defense was counterbalanced by the "compelling evidence of Respondent's hostility towards the Union, Moffat's involvement in it, and the shifting reasons given for the discharge" (*ibid.*).

With respect to Nagy's discharge, the ALJ found that respondent had failed to support its defense that Nagy was a thief or that it reasonably believed that he had engaged in theft (App. C, *infra*, 52a-62a). The ALJ cited respondent's inconsistent explanations of the reasons for Nagy's discharge; its failure to substantiate its defense with anything other than alleged admissions by Nagy to other employees; its reliance upon "transparently unreliable" evidence to support its theft charges, while simultaneously ignoring the most reliable evidence presented to it, that is, the police report exonerating Nagy; and, finally, its failure to afford Nagy an opportunity to respond to the charges against him (*id.* at 62a).

The Board affirmed the decision of the ALJ and adopted his recommended order (App. C, *infra*, 16a-20a).

3. The court of appeals sustained the Board's Section 8(a)(1) findings (App. A, *infra*, 3a-5a).⁴ However, it vacated the portion of the Board's order reinstating Moffat and Nagy and awarding them back pay and lost seniority. It remanded to the Board for reconsideration of the Section 8(a)(3) findings in light of the court's prior rejection of the Board's *Wright Line* burden of proof allocation in *Behring International, Inc. v. NLRB*, 675 F.2d 83 (3d Cir. 1982), petition for cert. pending, No. 82-438 (filed Sept. 13, 1982) (App. A, *infra*, 5a-10a). The court concluded that, while the ALJ ultimately had rejected the legitimate reasons for the discharges advanced by respondent, he had nonetheless "imposed on the Company the task of establishing lack of impermissible motive and thus misallocated the burdens of proof" (*id.* at 7a).

⁴ We present no issue concerning this portion of the court of appeals' opinion.

REASONS FOR GRANTING THE PETITION

On November 15, 1982, this Court granted the Board's petition for certiorari in *NLRB v. Transportation Management Corp.*, No. 82-168, a case in which the Board seeks review of a First Circuit decision rejecting the burden-shifting aspect of the Board's *Wright Line* test.⁵

Here, the Third Circuit, following its earlier decision in *Behring International, Inc. v. NLRB*, 675 F.2d 83 (3d Cir. 1982), petition for cert. pending, No. 82-438 (filed Sept. 13, 1982),⁶ has likewise rejected the burden-shifting aspect of the Board's *Wright Line* test, in concluding that only the burden of production, not the burden of persuasion, could shift to respondent after the General Counsel establishes that an employee's protected activity was a motivating factor in the discharge decision. Moreover, as the remand makes clear, the court considered the allocation of burdens of proof to be material in this case. Thus, this case presents the same issue that will be resolved by the Court in *Transportation Management*.

⁵ Copies of our petitions in *Transportation Management* and *Behring International* have been sent to respondent.

⁶ The Third Circuit in *Behring International* expressly relied on First Circuit decisions. The First Circuit initially expressed its disapproval of the Board's *Wright Line* test in the proceedings to review the *Wright Line* order. 662 F.2d at 904-907. (Because the First Circuit believed that the shifting of the burden of proof was not material to the outcome of *Wright Line* itself, it enforced the Board's order in that case (*id.* at 907-909)). Both the Third Circuit in *Behring International* (675 F.2d at 89) and the First Circuit in *Transportation Management* (82-168 Pet. App. 3a) relied on the First Circuit's discussion in the *Wright Line* case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's decision in *NLRB v. Transportation Management Corp.*, No. 82-168.

Respectfully submitted.

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DECEMBER 1982

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3132

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BLACKSTONE COMPANY, INC., RESPONDENT

(Nos. 22-CA-8880, 22-CA-9639 & 22-RC-7657)

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

Argued July 26, 1982

Before: GIBBONS and HUNTER, *Circuit Judges*
and LORD *, *District Judge*
(Opinion filed August 11, 1982)

OPINION OF THE COURT

GIBBONS, *Circuit Judge*.

This petition for enforcement of an NLRB cease and desist and reinstatement order arises out of the

* Hon. Joseph S. Lord, III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

NLRB's findings of violations of Sections 8(a)(1) and (a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (a)(3) (1976) (the Act), by the Blackstone Company, Inc. (the Company). Because we believe the Administrative Law Judge applied the wrong burden of proof to the Company in its attempt to rebut the General Counsel's *prima facie* case of violations of § 8(a)(3) in the discharge of two employees, we remand to the Board for further proceedings on those charges. In all other respects we enforce the Board's order.

I.

The Company, which manufactures and distributes wooden windows, doors and related products for use in the construction industry, employs approximately 40 persons as production workers, warehousemen and drivers. In May 1978, the Teamsters Local Union No. 35 (the Union) began an organizing campaign at the Company's East Brunswick plant with meetings among Union officials and small numbers of employees at local restaurants and private homes. Early in September 1978 the Union stepped up its efforts with an organizing meeting held at a local McDonald's restaurant, which was attended by a number of drivers. During the meeting, several employees signed Union authorization cards and shortly after the meeting, an in-plant organizing committee was formed to distribute literature and cards on behalf of the Union. On September 28, 1978 the Union filed a representation petition, and on November 21, 1978 the election was held. The Union lost the election,¹ and on De-

¹ Eighteen employees voted for representation and 18 voted against. There were two challenged ballots. An administrative ruling on the challenged ballots resulted in a revised vote

ember 6, 1978 and February 29, 1979 it filed complaints with the Regional Office of the NLRB, alleging various unfair labor practices committed by the Company during the pre-election period, while resolution of the election objections was pending, and by the Company's discharge of two employees, Robert Nagy and Kevin Moffat. After an investigation, the General Counsel issued a complaint charging that the Company violated § 8(a)(1) of the Act by promising employees benefits, interrogating and threatening them and creating the impression of surveillance, and violated §§ 8(a)(1) and (a)(3) of the Act by its discharge of the two employees. After a hearing on January 30, 31 and February 1 and 4, 1980, an Administrative Law Judge (ALJ) found that the Company had violated §§ 8(a)(1) and (a)(3), entered a cease and desist order, and ordered reinstatement of Nagy and Moffat. 32a-33a. The Company filed objections to the ALJ's findings, 36a, but the NLRB affirmed the findings and order of the ALJ and ordered that a second election be held. 43a. On December 31, 1981 the NLRB filed its petition for enforcement.

II.

The 8(a)(1) Violations

We are bound to affirm the administrative factual findings and inferences drawn from the facts when they are supported by substantial evidence contained in the record as a whole. *E.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 164

of 18 for representation, and 19 against. Neither the representation petition nor the objections are before the court on this petition for enforcement.

n.6 (3d Cir. 1977); *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 243 (3d Cir. 1976). This standard of review requires deference to the ALJ's interpretation of what can be characterized as fairly conflicting accounts of events presented on the record. *E.g.*, *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 405 (1962).

The findings of violations of § 8(a)(1)² need not detain us at greath length. To establish a violation of § 8(a)(1), the NLRB must show that "under the circumstances existing, [the employer's conduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *NLRB v. Armcor Industries, Inc.*, *supra*, 535 F.2d at 242, quoting, *Local 542, International Union of Operating Engineers v. NLRB*, 328 F.2d 850, 852-53 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964).

Numerous employees testified that Company Vice President Stanley Swerdlick questioned them as to their Union support, indicated to them that he knew which employees had signed Union authorization cards or otherwise favored the Union, and, in some cases, threatened them with loss of employment if the Union succeeded. The ALJ concluded that these activities created the impression of surveillance, and constituted unlawful interrogation and threats of economic reprisals. One employee testified that he re-

² Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1976). Section 157 provides in part that "employees shall have the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for . . . other mutual aid or protection." 29 U.S.C. § 157 (1976).

quested a pay raise, and that Swerdlick promised to take care of him when the Union matter was resolved. The ALJ found that Swerdlick intended to convey the impression that the sole reason for refusing to consider the employee's request immediately was the Union activity. The ALJ further found that the Company violated the Act by making unlawful promises of benefits in the form of additional holidays and a profit sharing plan, in order to discourage Union support.

The Company disputes the findings of the ALJ as to these § 8(a)(1) violations. However, as we stated in *Behring International, Inc. v. NLRB*, No. 81-1937 (3d Cir. 1982),

[W]e might well have come to a different conclusion had we tried the case in the first instance. Our role, however, is limited to determining whether there is substantial evidence in the record as a whole to support the Board's findings of fact. 29 U.S.C. §160(e) (1976). Similarly, credibility resolutions generally rest with the ALJ when he considers all the relevant factors in his explanation. *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 365 (3d Cir. 1978). Since we cannot say that substantial evidence is lacking here, we must reject the company's challenges to the § 8(a)(1) findings.

Typescript at 5.

III.

The 8(a)(3) Violations

We find far more troublesome the Board's finding that the Company violated § 8(a)(3) ³ by discharging

³ Section 8(a)(3) makes it an unfair labor practice for an employer to "encourage or discourage membership in any

Nagy and Moffat. Nagy and Moffat were both Union supporters, and had signed authorization cards. Because the Company was aware of their Union activity, and because their discharges occurred in the context of numerous § 8(a)(3) violations, the ALJ found that the General Counsel had established a *prima facie* showing that protected conduct was a motivating factor in the Company's decisions to discharge them.

The burden then shifted to the Company to proffer a legitimate non-discriminatory justification for the discharges. In the case of Nagy, the Company asserted that it had fired him because of thefts and various other incidents of misconduct.⁴ The Company presented affidavits and testimony of three witnesses who claimed Nagy confessed stealing, or that they actually witnessed acts of theft. Nagy denied any such incidents, and thus created a dispute as to the true motive behind Nagy's discharge.

The Company alleged that it terminated Moffat for incompetence. A Company supervisor testified that he had received reports from three of Moffat's co-workers, each stating that Moffat was a poor driver and poor worker. The ALJ specifically credited the report from one of the co-workers that Moffat used excessive speed and would not make a satisfactory

labor organization" by "discrimination in regard to hire or tenure of employment or any term or condition of employment" 29 U.S.C. § 158(a) (3) (1976).

⁴ These incidents included (1) assisting other employees in thefts; (2) submitting false gasoline receipts; (3) offering to exchange marijuana for false gasoline receipts from a gas station attendant; (4) threatening to pound Shipping Manager William Bostic's head in the snow; (5) planning to have Bostic's legs broken; (6) smoking marijuana while on duty. Nagy denied all six allegations. 19a.

driver or loader. 29a. Thus, there was conflicting evidence as to the reason for Moffat's discharge.

In *Behring International, Inc. v. NLRB*, *supra*, we outlined the burdens of coming forward and of proof in such a case:

Under our formula, once the General Counsel has established a *prima facie* case of discriminatory discharge, the employer should rebut this with evidence of a legitimate business reason for its action. The ultimate burden of proof does not shift from the General Counsel and does not devolve upon the employer at any stage. Therefore, no violation may be found unless the Board determines that the General Counsel has proved by a preponderance of the evidence that the employer's antiunion animus was the real cause of the discharge.

Typescript at 14. In adopting the above formulation we rejected that of the NLRB in *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), which shifts the burden of persuasion on the issue of motive to the employer once the General Counsel establishes a *prima facie* case of discriminatory discharge.

According to the NLRB, this is not a case of dual motive, but instead presents the issue whether substantial evidence supports the ALJ's finding that the Company's asserted justifications for the discharges were not credible. Brief at 28. Although the ALJ did ultimately reject the legitimate reasons advanced for the discharges, the ALJ imposed on the Company the task of establishing lack of impermissible motive and thus misallocated the burdens of proof. The ALJ repeatedly stated that the Company had failed to estab-

lish its asserted defenses to the two discharges. Rejecting the Company's justification for its discharge of Nagy, the ALJ concluded:

It is my opinion that on this record Respondent has failed to support its defense that Nagy was a thief or that it was reasonable to have such a belief. The defense rests exclusively on the alleged admissions made by Nagy to Voloysn, Prell and Barkaszi[;] admissions which Nagy denied. There is no independent evidence supporting the various allegations, and indeed there is no convincing evidence that anything was stolen, let alone by Nagy. . . . Respondent made no effort to demonstrate that such items actually were removed without authorization, either from its plant or from customers. . . . With respect to the case of the stolen drop light there is no evidence that such a light was stolen or that such a light even existed, again apart from Nagy's alleged admission. . . . [A]lthough [the Company] claimed to have received a \$13.94 bill from the contractor for the light and to have paid it, no convincing records were introduced to establish these facts. And finally the failure to call the contractor, or to explain such failure, to establish the fact of a stolen light and the report thereof to Respondent, under all the circumstances, is a serious weakness in Respondent's case.

24a. Similarly, in Moffat's case, the ALJ imposed upon the Company the burden of proving its innocence of impermissible motive. For example, the ALJ stated:

Although, Respondent has shown that it had a practice of discharging employees for poor per-

formance, I conclude that it has not sustained its burden of establishing that Moffat fell within that group of poor workers so that he would have been fired in the absence of his having engaged in protected activity.

29a. Because the hearing in this case was held prior to our opinion in *Behring International, supra*, and because the ALJ explicitly relied on the *Wright Line* test in allocating the respective burdens of proof, 20a, this case must be remanded to the NLRB for reconsideration.⁵

⁵ During oral argument, Board counsel took the position that the Board and Administrative Law Judges would continue to follow Board decisions, and not Third Circuit law:

MR. BURGOYNE: The record, I think—although it possibly is a teeny bit ambiguous, your Honor—I can't dispute that the Administrative Law Judge applied, because he was bound to apply, the Board's *Wright Line* decision.

The Board has instructed its Administrative Law Judges that they are bound by the Board's decisions here.

This court has told us—and we have disagreed with the court on this—this court believes that we are required at least in cases arising within the area of the Third Circuit that [we'll] apply Third Circuit law; and, of course, this court is aware that the Board—that is not the Board's position.

Counsel in fact stated that the Board was different from other litigants in the circuit:

MR. BURGOYNE: We feel that we are different in the sense that we are—we are an agency of the federal government.

The Board will not be treated differently from any other litigant. Whether or not the Board agrees with the holdings of this court, it is bound to follow them. *See, Allegheny General Hospital v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979). We consider the Board's contrary instructions to its Administrative Law Judges to be completely improper and reflective of a bureaucratic arrogance which will not be tolerated.

IV.

The NLRB's Order reinstating Kevin Moffat and Robert Nagy and awarding them back pay and lost seniority will be vacated and the case remanded for further proceedings. In all other respects, the order will be enforced. Each party will bear its own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3132

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BLACKSTONE COMPANY, INC., RESPONDENT

JUDGMENT

Before: GIBBONS and HUNTER, *Circuit Judges* and
LORD *, *District Judge*

THIS CAUSE came on to be heard upon the application for enforcement of an order of the National Labor Relations Board dated September 30, 1981, against Respondent, Blackstone Company, Inc., East Brunswick, New Jersey, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on July 26, 1982, and has considered the briefs and transcript of record filed in this cause. On August 11, 1982, the Court being fully advised in the premises handed down its opinion enforcing in part, vacating in part and remanding the case in part to the Board for further proceedings. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, Blackstone Company, Inc., East

* Hon. Joseph S. Lord, III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Brunswick, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their own union activity and the Union activity of their co-workers.

(b) Creating the impression that it has the Union activities of employees under surveillance.

(c) Threatening its employees with loss of employment, discharge or plant closing because they engage in Union activity or support the Union.

(d) Warning employees to refrain from Union activities and not to associate with Union members or supporters.

(e) Refusing to consider requests for wage increases because employees engaged in Union activities.

(f) Promising employees profit sharing and additional paid holidays to induce them not to support the Union.

(g) In any like or related manner interfering with restraining or coercing employees in the exercise of their rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which has been found necessary to effectuate the policies of the Act.

(a) Post at its East Brunswick, New Jersey plant, copies of the notice attached hereto marked "Appendix" copies of said notice on forms provided for the Regional Director for Region 22 of the National Labor Relations Board (Newark, New Jersey), after being duly signed by the Respondent's authorized representative, shall be posted by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees custom-

arily are posted. Reasonable steps shall be taken by said Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing within 20 days from the date of this judgment what steps it has taken to comply herewith.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the case be and it is hereby remanded to the Board for further proceedings.

IT IS FURTHER ORDERED AND ADJUDGED that each party shall bear its own costs.

BY THE COURT

/s/ John J. Gibbons
Circuit Judge

DATED: October 1, 1982

Certified as a true copy and issued in lieu of a formal mandate on October 25, 1982.

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit

NOTICE TO
EMPLOYEES

[SEAL]

[SEAL]

POSTED PURSUANT TO A JUDGMENT OF THE
UNITED STATES COURT OF APPEALS EN-
FORCING, AN ORDER, AS MODIFIED, OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

AFTER A TRIAL IN WHICH ALL PARTIES PAR-
TICIPATED AND WERE AFFORDED THE OP-
PORTUNITY TO PRESENT EVIDENCE IN SUP-
PORT OF THEIR RESPECTIVE POSITIONS, IT
HAS BEEN FOUND THAT WE HAVE VIOLATED
THE NATIONAL LABOR RELATIONS ACT IN
CERTAIN RESPECTS AND WE HAVE BEEN
ORDERED TO POST THIS NOTICE AND TO
CARRY OUT ITS TERMS.

The National Labor Relations Act, gives you, as em-
ployees, certain rights including the right:

- To engage in self organization;
- To form, join, or help a union;
- To bargain collectively through
a representative of your own choosing;
- To act together for collective bargaining
or other mutual aid or protection; and
- To refrain from any or all of these things.

Accordingly, we give you these assurances

WE WILL NOT coercively interrogate our em-
ployees about their union activities or beliefs.

WE WILL NOT create the impression that we have
the union activities of our employees under sur-
veillance.

WE WILL NOT threaten our employees with loss
of employment, discharge or plant closure because of
their union activities or beliefs.

WE WILL NOT warn our employees to refrain from union activities and not to associate with union members or supporters.

WE WILL NOT refuse to consider requests for wage increases because employees engage in union activities.

WE WILL NOT promise our employees profit sharing and additional paid holidays to induce them not to support a union.

WE WILL NOT in any like or related manner interfere with, refrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

The election held on November 21, 1978, by the National Labor Relations Board, has been set aside and its results voided. In due time another election will be held, and you will be notified of the date, time and place.

BLACKSTONE COMPANY, INC.
(Employer)

Dated

By

(Representative)

(Title)

**THIS IS AN OFFICIAL NOTICE AND MUST
NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino, Jr. Federal Building—Room 1600, 970 Broad Street, Newark, New Jersey 07102 Telephone No. (201) 645-3652.

APPENDIX C

FJZ

258 NLRB No. 124

D—8191

East Brunswick, NJ

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 22—CA—8880,
22—CA—9639, and
22—RC—7657

BLACKSTONE COMPANY, INC.

and

TEAMSTERS LOCAL UNION No. 35,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA

DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION

On March 27, 1981, Administrative Law Judge Edwin H. Bennett issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief

and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Blackstone Company, Inc., East Brunswick, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election conducted on November 21, 1978, among the Employer's employees be, and it hereby is, set aside, and that Case 22—RC—7657 be, and it hereby is, severed and remanded to the Regional Director for Region 22 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate,

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

at such time as the Regional Director deems appropriate. The Regional Director for Region 22 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.² Those

² In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 22 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall

eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Teamsters Local Union No. 35, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Dated, Washington, D.C. September 30, 1981.

/s/ John H. Fanning
JOHN H. FANNING, Member

/s/ Don A. Zimmerman
DON A. ZIMMERMAN, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

MEMBER JENKINS, dissenting in part:

I would not apply *Wright Line*, a *Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), here. The Administrative Law Judge found Respondent's asserted lawful reasons for discharging Nagy and Moffat to be supported only by "transparently unreliable evidence" a "flimsy and transparent house of cards," and "unreliable, vague, and suspect, and almost nonexistent" evidence. In short, the asserted lawful reasons did not exist.

In such case, there is only one genuine reason for the discharge, the unlawful one, and the *Wright Line* analysis, designed to distinguish between two genuine reasons of which one is unlawful, is useless. The result is necessarily the same with or without *Wright Line*, and it is stultifying pretense to assert we "apply" *Wright Line* in such cases—a pretense which can only damage our posture before the courts of appeals. I had thought we had departed this barren ground in *Limestone Apparel Corp.*, 255 NLRB No. 101 (1981), but apparently my colleagues still linger there.

Dated, Washington, D.C. September 30, 1981

/s/ Howard Jenkins, Jr.
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

21a

JD-(NY)-30-81

East Brunswick, N.J.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES
BRANCH OFFICE
NEW YORK, NEW YORK

Cases Nos. 22-CA-8880
22-CA-9639
22-RC-7657

BLACKSTONE COMPANY, INC.

and

TEAMSTERS LOCAL UNION No. 35, a/w
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA

Bernard Mintz, Esq. for the General Counsel.
Theodore M. Eisenberg, Esq., of Grotta, Glassman
& Hoffman, for Respondent/Employer.

DECISION

Statement of the Case

EDWIN H. BENNETT, Administrative Law Judge:
This proceeding was heard on January 30, 31, February 1, and 4, 1980 in Newark, New Jersey. The complaint cases arise from charges filed by Teamsters Local Union No. 35, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (hereinafter called the Charging Party or the Union) on December 6, 1978 and February 28,

1979, in Cases Nos. 22-CA-8880 and 22-CA-9639 respectively. Those cases resulted in the issuance of an Order Consolidating Cases, First Amended Complaint and Notice of Hearing dated April 19, 1979, alleging *inter alia*, that Blackstone Company, Inc. (at times called Respondent, Company, or Employer) violated Section 8(a)(3) and (1) of the Act by its discharge of employees Robert Nagy and Kevin Moffat. Additionally it is alleged that Respondent promised its employees benefits, interrogated them, threatened them, and created the impression of surveillance, all in violation of Section 8(a)(1) of the Act.

The representation matter, Case No. 22-RC-7657, was consolidated for hearing with the complaint cases by an Order dated April 27, 1979. That matter has its origin in a petition filed by the Union on September 28, 1978, seeking an election in a unit of production and maintenance employees employed by the Employer at its East Brunswick, New Jersey location. An election was conducted on November 21, 1978, pursuant to a Stipulation For Certification Upon Consent Election which had been entered into by the parties on October 17, 1978. In that election 18 employees voted for representation, 18 against, and there were 2 challenged ballots. Objections were timely filed by the Union in November 29, 1978. An administrative ruling on the challenged ballots by the Regional Director resulted in the issuance on May 3, 1979, of a revised tally which disclosed that 18 votes had been cast for Union representation and 19 against. As the remaining challenged vote could not be determinative, it was not resolved. However, the objections are at issue in this consolidated proceeding. Although there are four separate objections stated the Union did not participate in the hearing, and thus

only so much of its objections as were litigated in connection with the unfair labor practices properly are before me for resolution. The Respondent denies that it committed any unfair labor practices or that it engaged in any objectionable conduct.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent's only facility is the factory and plant involved in this controversy which it operates in East Brunswick, New Jersey, and where it is engaged in the manufacture, sale, and distribution of wood windows, doors, and related products for use in the construction industry. Respondent annually sells and ships such products valued in excess of \$50,000.00 directly in interstate commerce. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The unfair labor practices

A. The Section 8(a)(1) Violations

Conduct by Stanley Swerdlick

There were approximately 40 employees working for Respondent as production workers, warehousemen and drivers when the Union began its efforts to organize in about May of 1978. Until about September

1978, these efforts primarily consisted of Union officials meeting with a few employees away from Respondent's premises. According to Nagy, who was a spearhead in the campaign, the Union activity intensified in September. Nevertheless, David Vance, a driver and one of the employees who attended the early meetings, testified that while at work on about July 1, 1978, Stanley Swardlick, Respondent's Vice-President, told him he had heard that Vance was carrying Union cards in his pockets. No one else was present and Vance could recall nothing else about the conversation which was denied by Swardlick. Vance also testified that later in July he attended a Union meeting with 3 or 4 other employees which had been held in a van away from the plant and again was confronted by Swardlick who referred to that meeting and repeated some of Vance's pro-Union comments, as well as remarks he made about an employee, Frank Bowman, who had been discharged. None of the employees who were in the van testified at the hearing and no one else was present when Swardlick allegedly spoke to Vance. Vance also testified that Swardlick's remarks were made during a conversation in which Vance was reprimanded for poor work. Swardlick acknowledged a conversation with Vance with respect to work performance at about this time but otherwise denied that he made any references to union activities.

Although I do not credit Swardlick's testimony in other matters as discussed below, I am unable to give full credence to Vance's unsupported testimony concerning the two incidents in July 1978, which General Counsel alleges as violations. Vance was extremely vague with respect to the specifics of the critical conversations and his recollection of events at

trial not only was hazy but was inconsistent with his pre-trial affidavit. His testimony alone, there being no independent evidentiary basis to rely upon, is not sufficiently convincing. Accordingly, I shall recommend dismissal of the complaint with respect to the alleged foregoing conduct of Swerdlick.

The Union campaign accelerated in early September 1978, with a meeting conducted by a Union organizer at a McDonald's restaurant on the morning of September 8. A number of drivers were in attendance including Nagy, Vance, Joseph Dafcik, William Friewald, Kevin Moffat, and Richard Rizzo. The gathering took place while the drivers were on a breakfast break and in addition to discussing the benefits of a union, authorization cards were signed by some of the employees who returned them to the organizer. After that meeting the organizing drive intensified with Nagy and Dafcik in the forefront as part of an in-plant organizing committee. They credibly testified they distributed cards and literature directly to other employees in the parking lot outside the plant and gave cards to warehouse employees for further distribution by them. It was conceded by William Bostick the shipping manager and an admitted supervisor who began work for Respondent in early August 1978, that he began to hear of the organizing drive in September while working on the loading docks with employees. In addition to the activity around the plant Nagy also made visits to the homes of the employees. On September 28, 1978, the Union filed its petition in the representation case, and active campaigning by Nagy, Dafcik, and the other employees continued up to the election held on November 21, 1978.

The consolidated complaint alleges that shortly after the meeting at McDonald's in early September 1978, Respondent embarked upon an extensive campaign of its own, using various unlawful means, to counter the organizing efforts of its employees. To this end Moffat testified he was summoned into Swerdlick's office as he arrived for work a few days after the McDonald's meeting and was told that he (Swerdlick) knew of the meeting at McDonald's and had the names of all those who attended and who signed cards. He then warned Moffat that he did not want the employees to harm the Company.¹ This conversation was denied by Swerdlick.

Rizzo who testified as a witness for both General Counsel and Respondent in support of various parts of their respective cases, recalled that he too had a conversation with Swerdlick in the latter's office a few days after the breakfast meeting at McDonald's. According to Rizzo, Swerdlick asked him who was in attendance at the meeting and if cards had been signed for the Union. Rizzo replied that he was reluctant to name anyone for fear of jeopardizing his friendship with them. Swerdlick then reeled off the names of those who had been in attendance including Vance, Nagy, Friewald, and Dafcik, with Rizzo acknowledging the accuracy of Swerdlick's recitation. Swerdlick then went through the identical routine in questioning Rizzo as to who had signed Union card, i.e., Rizzo declined to specify names but merely responded affirmatively as Swerdlick recited the aforementioned employees. Swerdlick, who testified that he learned of the Union organizing campaign from his partner William Schwartz sometime in the early or middle part

¹ Swerdlick personalized the warning with use of obscene language.

of September 1978, and that Schwartz's knowledge was based upon a letter he had received requesting recognition, swore that although he asked Rizzo the names of those who attended a breakfast meeting at McDonald's his only concern was to identify those employees who were taking unauthorized breaks during the course of the day. Swerdlick further swore that Rizzo volunteered the information that there was a Union agent in attendance at the meeting who collected some sort of cards. Swerdlick denied that he questioned Rizzo with respect to who supported the Union or who had signed cards, and he further denied that he knew which employees favored unionization.

I find completely credible the testimony of Moffat and Rizzo concerning their encounters with Swerdlick as set forth in the preceeding two paragraphs.² Their testimony about these meetings, which were separately conducted, indicates a pattern of activity by Swerdlick designed to ascertain or confirm the identity of the Union supporters. I find incredible Swerdlick's assertion that Rizzo who was reluctant to identify the employees in attendance, would have volunteered the fact that there was a Union agent present, and even this testimony grudgingly was conceded by him on cross-examination. Moreover, it is implausible that he questioned Rizzo solely to learn which employees were taking unauthorized breaks out of concern that employees were not working a full day and then did absolutely nothing about correcting the "abuse" with the employees involved. Given Swerdlick's totally unconvincing testimony with regard to the Rizzo conversation, in view of Rizzo's and Moffat's testimonial reliability (unequivocal recounting of

² Rizzo clearly was an impartial witness who gave testimony supportive of Respondent's case as well.

events without embellishment or conclusions), and the similarity of their experiences with Swerdlick, I discredit the latter's flat denials that he questioned them about the Union.³ Accordingly, it is my conclusion that in mid-September 1978, Swerdlick questioned Moffat and Rizzo concerning the organizing activity of Respondent's employees. These interrogations by top management designed to learn the identity of Union supporters, conducted in a formal and hostile atmosphere, clearly are coercive and in violation of Section 8(a)(1). *General Automation Manufacturing, Inc.*, 167 NLRB 502 (1967). Further, by naming those who attended the meeting with accuracy, while concealing the source of his information, Swerdlick clearly conveyed the impression that Respondent had the meeting under surveillance, thus further violating Section 8(a)(1) of the Act. *N.L.R.B. v. S&H Grossinger's, Inc.*, 372 F.2d 26, 28 (2d. Cir. 1967).

Moffat also testified that shortly after he left Swerdlick's office he was standing near a truck about to enter it when Swerdlick came over to him and said that if a union was brought in there could be a loss of business and the new employees would be the first ones laid off. At that time, Moffat was the second least senior driver or helper. This too was denied by Swerdlick who denied having had conversation at all with Moffat concerning the Union. Having concluded that Swerdlick unlawfully interrogated Moffat in his office, these later remarks attributed to him by Moffat can be seen as but a continuation of the same conversation. Accordingly, I give no greater credence to

³ That two employees who did not impress me as having a particularly friendly or close relationship were subject to similar questioning by Swerdlick, lends a high degree of reliability and trustworthiness to their testimony.

Swerdlick's denial of these disputed remarks than I accorded to his denial of the earlier remarks. Based on Moffat's credited testimony it is my conclusion that Respondent, through Swerdlick, implied that the advent of the Union would result in the loss of employment generally, and for Moffat in particular, and that such statement was made without any legitimate foundation or business justification. As such, it constituted a plain threat of reprisal in violation of Section 8(a)(1) of the Act.

Dafcik testified that a short time after the distribution of cards began in early September, Swerdlick told him he knew about the Union organizing campaign but that it would be of little benefit for the employees and warned that as Respondent would be unable to meet Union demands it would be forced out of business. This was denied by Swerdlick. The very next morning according to Dafcik, he and Nagy were approached by Swerdlick who remarked that he heard they were still passing out cards. Dafcik had a few unsigned cards in his possession which he then handed to Swerdlick stating that he did not want to be involved with the Union further. Nagy was less certain of the date and believed it occurred in October, but otherwise he fully corroborated Dafcik. Nagy also testified credibly that on the preceding day he and Dafcik did distribute Union materials in Respondent's parking lot. Swerdlick's version of the incident is that one morning as Dafcik was preparing to take out his truck, and without any prompting, Dafcik offered him some Union cards while stating that he was not interested in the Union, and that he (Swerdlick) responded that he was not interested in receiving the cards or in discussing the matter and that he simply walked away. Swerdlick's testimony in this regard

bears a striking resemblance to his discredited explanation of the incident with Rizzo, in that he places on the employee the onus of volunteering information about the Union campaign, and I do not credit it. Nor do I credit his denial of the incident with Dafcik the preceding day. On the other hand, I am persuaded that Dafcik's attempt to distance himself from the Union campaign by offering the cards in his possession to Swerdlick, is an action wholly consistent with what an employee might do out of fear or apprehension arising from threats of reprisal. Accordingly, based upon both the inherent probability of the events as testified to by Dafcik and Nagy as well as the favorable impression they made as witness, I credit their testimony and find that Respondent, by Swerdlick, in early to mid-September 1978, violated Section 8(a)(1) by again threatening economic reprisals (loss of jobs, plant closing) because of the Union activity, interrogating employees about their Union activity, and conveying the impression of surveillance.

Dafcik testified to another conversation with Swerdlick concerning the Union which occurred one morning shortly after the petition was filed on September 28, 1978. As assignments were being distributed for the day by Swerdlick, Dafcik expressed his belief that he was a harder and more efficient worker than some of the other drivers but was receiving less pay. Dafcik testified that Swerdlick responded to the effect that he would be able to take care of him after the Union matter was finished. Respondent sought to impeach this testimony by referring to Dafcik's pre-trial affidavit where it states that Swerdlick said "he would have to wait until after the union either got in or not," that Dafcik replied "that's why I was for the union, that the pay and conditions weren't good,"

and that Swerdlick responded, "let's get this business of the union over with, then he would then be able to take care of me." Swerdlick did not testify with respect to any such incident and was not questioned regarding any future commitments or promises to Dafcik in particular. However, he did testify that he never promised any employee any improvement or benefit in order to have the employee refrain from union activity. Even if Swerdlick had denied precisely the testimony of Dafcik, I would credit the latter. As noted above Dafcik was an impressive witness who had good recall of various incidents despite vigorous cross-examination by Respondent, and who testified consistent with his pre-trial affidavit.⁴ Dafcik generally impressed me as a trustworthy witness, while Swerdlick, as discussed above, was not forthcoming and candid in matters relating to the Union. Accordingly, I give full credence to Dafcik's testimony regarding this incident, and therefore will consider whether or not a violation of the Act was committed.

Swerdlick's remarks contained no express promise of a specific benefit contingent upon a Union loss. Construing the remarks in a light most favorable to Respondent, Swerdlick merely deferred consideration of the request for a wage increase pending the outcome of the election. Yet even though the granting of an increase was not made contingent upon the result of the election, in my opinion the deferral itself nevertheless was calculated to impress upon Dafcik that the advent of the Union was the sole reason for failing to consider what might otherwise have been

⁴ Respondent's introduction of the affidavit section quoted, rather than impeaching Dafcik, is supportive of the testimony, and is probative of the event as testified to by Dafcik.

a valid request. By such conduct a stigma was placed on the Union for Respondent's refusal even to consider Dafcik's request to rectify what he believed to be a wage inequity. Respondent's refusal to consider the raise because of the union activities of its employees constitute a violation of Section 8(a)(1) of the Act whether it is viewed as a present denial of economic benefit or a promise of potential economic gain. *American Commercial Bank*, 226 NLRB 1130, 1132 (1976). Furthermore, to withhold the possibility of a wage increase, or the consideration thereof, which otherwise would have been done but for the Union organizing campaign and to so advise employees constitutes a violation of Section 8(a)(1) of the Act even if the Respondent erroneously believed that its actions were compelled by the pending election petition. *Dorn's Transportation Co.*, 168 NLRB 457 (1967).

Dafcik further testified that on the very day (early October 1978) Swerdlick followed Nagy and himself into the men's toilet. Immediately, Dafcik offered to hand Swerdlick some blank Union authorization cards but Swerdlick refused them saying that they should be destroyed. Dafcik threw the cards into the garbage and as they left the room, Swerdlick told them that if the Union came into Blackstone and it "goes down everybody goes down." In his pre-trial affidavit Dafcik stated that as he sought to hand Union cards to Swerdlick, the latter refused them saying it was against the law for him to accept them. Dafcik on his own then ripped them up and threw them in the garbage. Nagy, in his testimony placed this incident as occurring in late October or early November, however, he substantially corroborated Dafcik with respect to Swerdlick's quoted remarks. Nagy's testi-

mony also differed somewhat from that of Dafcik with respect to the matter of the cards. Nagy recalled that Swerdlick took the cards from Dafcik but he did not see what if anything, was done with them. Nagy was certain of an incident in the employees' toilet because there was a separate toilet for management which Swerdlick normally used.

Swerdlick, who as noted, generally denied any wrongdoing, did not specifically deny the foregoing incident. He testified that he had entered the employees' men's room on only one occasion for the limited purpose of seeing if obscenities directed at him had been scrawled on the wall. I am persuaded that there was an incident in the men's room involving Swerdlick, Dafcik, and Nagy at which the subject of unionization was discussed, but that many of the details are far from certain. I credit Dafcik and Nagy that Union cards were proffered to Swerdlick but I cannot credit Nagy that Swerdlick received them in view of Dafcik's testimony and his pre-trial affidavit, and thus there is an insufficient basis to attribute to the Respondent Dafcik's offer, and subsequent destruction of the cards. One can only infer that Dafcik did so in the belief that it would curry favor with Respondent. However, Nagy and Dafcik were quite certain, and I credit their testimony to the effect that Swerdlick did state that the Company would "go down" in the event of unionization. The clear import of such statement is that unionization would result in either a closing of the business or certainly in the loss of employment. Swerdlick's general denial that he threatened employees cannot be accepted in view of his lack of candor concerning his actions in seeking to dissuade employees from unionization. Accordingly, I find that Swerdlick violated

Section 8(a)(1) by threatening employees with loss of jobs in the event they chose the Union and that this incident occurred after the petition was filed, in early October 1978.⁵

The evidence also supports the allegation that Swerdlick violated Section 8(a)(1) in late October 1978. According to employee William Friewald, when he returned his truck to the plant one evening Swerdlick told him that his friends Nagy and Dafcik were involved in Union activity and that he (Friewald) should stay from them and not listen to their Union talk. Friewald responded that he wasn't for the Union, and Swerdlick replied "good." In fact, Friewald was a friend of Dafcik and Nagy, had attended the Union meeting at McDonald's where he signed a card a fact known to Swerdlick. Friewald testified he replied as he did in order to avoid trouble. Swerdlick was not specifically questioned with respect to this conversation although, as noted previously he denied that he had ever threatened or questioned any employee about the Union, a denial which I have rejected in other respects and, which I reject here as well. Swerdlick's comments here in issue are consistent with his other conduct found unlawful, and in crediting General Counsel's witnesses I consider it

⁵ Dafcik impressed me as more reliable than Nagy with respect to the date of an occurrence. The discrepancies in their testimony in this regard is no reason, however to discredit their testimony regarding the events themselves. If anything, the hesitancy or lack of precise recall as to dates, in my opinion, serves to strengthen the overall reliability and genuineness of their testimony. It evinces on their part an admirable degree of circumspection and prudence and lends an unrehearsed air to their testimony. These minor disagreements between them are most natural considering the time lapse and nature of the events.

significant that they did not attribute to other members of management conduct of a like nature. If they were bent on fabricating a pattern of unlawful activity there is no reason they would not have done so. Swerdlick alone bears the brunt of the accusations and it is interesting that he is described by Respondent as "tempermental." (Respondent's brief pg. 17). In crediting Friewald on this incident I have considered Respondent's various attacks on the credibility of General Counsel's witnesses.⁶

Conduct by William Schwartz

General Counsel also alleges that the Respondent made unlawful promises of benefits to persuade employees to abandon their support for the Union. This

⁶ For instance, Respondent's counsel contended that Friewald was unworthy of belief in any respect because he is a warlock in the Church of Satan. Counsel was permitted to question Friewald rather extensively concerning his beliefs and practices within that Church because of the assertion by counsel that Friewald engaged in such unorthodox and bizarre practices that his perception of reality is questionable. Although Friewald's sincerely held religious beliefs and practices may be considered by many to be out of the mainstream of organized Western religion, his testimony regarding the events in question was quite plausible and consistent with that of other witnesses. In all respects, Friewald appeared to have complete command and control of his senses, he testified in a lucid straightforward manner and he was perfectly aware of his surroundings. Finally, he had been employed by Respondent for some period of time, intrusted with the care of Respondent's property and materials, and performed his job satisfactorily, notwithstanding his membership in the Church of which Respondent had full knowledge. I reject counsel's contention that Friewald is unworthy of belief based solely on his membership in the said Church and his religious practices therein, as completely unwarranted and without any support in logic or law.

allegation concerns itself with two separate events; (1) a notice to employees that was posted in the plant;⁷ and (2) two speeches made by William Schwartz, Respondent's President, shortly before the election which was conducted on November 21, 1978. The notice which on its face is undated, is typed on Respondent's stationery and reads as follows:

WHAT'S NEW AT BLACKSTONE

ADDITIONAL HOLIDAYS

**WE ARE ADDING THE FOLLOWING PAID
HOLIDAYS TO OUR SCHEDULE**

FOR ALL EMPLOYEES

**YOM KIPPUR
WASHINGTON'S BIRTHDAY
GOOD FRIDAY**

**LOOK FOR A PROFIT SHARING
PENSION ANNUITY BEFORE YEAR-END**

We are working on this plan based on profits for any employee not enrolled in some other form of pension plan—look for details shortly.

General Counsel asserts the notice was posted during the Union organizing campaign and therefore was intended to discourage that activity. Respondent on the other hand contends that it was posted prior to any Union activity of which it was aware and was not related to such activity. Therefore it is apparent that

⁷ The complaint does not refer to the notice as such but this issue was fully litigated and briefed by the parties.

crucial to the General Counsel's case is proof concerning the time of its posting.

David Vance testified that his first awareness of the notice was shortly after the September 1978, meeting at McDonald's. Nagy's testimony on this matter was very uncertain. He could not recall if he ever saw the particular notice or some other document like it. Nor was he certain when he first saw any such document although he believed that it was sometime after the petition was filed on September 28, 1978. Friewald testified that he saw the notice perhaps three or four weeks before the election which would place it in early November. However, on cross-examination he testified that he had no specific recall with respect to the time when it was posted. Dafcik testified that he first saw the notice a few weeks after he signed his Union card, which would place the timing in late September 1978. The only other witness questioned by either side with respect to the posting of the notice was Schwartz himself who testified that he had it placed on the employee bulletin board in July 1978, prior to any Union activity of which he was aware. Thus, all General Counsel's witnesses, while uncertain of the date, place the period of posting as sometime between early September through mid-November, all within the period covered by the Union campaign. Although the document itself was undated Schwartz, who did not explain this omission, was certain it was posted in July because he linked the reference to the profit sharing plan to the fact that it had been under consideration since June 1978, as evidenced by a letter dated June 30, from one John Collins, an insurance salesman. That letter refers to a meeting the previous day regarding the "possibility of installing a pension and/or profit sharing plan,"

and that Collins would "put together some ideas . . ." to accomplish that purpose. In addition, Respondent argues the order of holidays would indicate that the very first holiday to be taken as a new one would be Yom Kippur which was celebrated October 11, 1978, therefore indicating the notice could not have been posted after that date.⁸

While it is true that Schwartz had some communication with Collins regarding the possibility of instituting a pension and/or profit sharing plan, it does not necessarily follow that the notice was posted on the heels of the aforesaid June 30th letter. According to Schwartz a profit sharing plan was not instituted until December 1978, and that plan is distinct from a pension plan. As noted, the letter refers to the fact that there might be either a pension or profit sharing plan and that Collins would submit further ideas. These circumstances hardly support Schwartz's testimony and indeed warrant an inference that by July 1, 1978, at least, the Company and Collins had only just begun arrangements. When these arrangements were completed is a mystery as Respondent offered no evidence at all on that critical issue. Not only is Schwartz's testimony silent, but records, which certainly were available to Respondent, and which would have been far more persuasive than the June 30, 1978 letter, were not introduced. I infer from such failure that if the appropriate records evidencing the finalization of a profit sharing plan had been introduced they would have unfavorable to Respondent's case.

⁸ Dafcik and Vance of course placed the posting in September 1978, so the force of Respondent's argument is unclear. I note too, that although General Counsel's witnesses are not uniform in their testimony, Schwartz's testimony is not corroborated by any witness.

See *Whitten Machine Works*, 100 NLRB 279, 285 (1952). Further, I deem it unlikely that Respondent would have posted a notice announcing that details of a profit sharing plan would be issued "shortly" a full six months before the plan became effective, and where there is no strong showing that such details *ever* issued. Finally, the unexplained fact that this notice did not bear a date on its face, unlike another employee notice posted on January 24, 1980, which is discussed below, tends to suggest that the confusion generated on this issue was not accidental. For all the foregoing reasons, I find the notice was posted in September 1978, after the Respondent knew of the Union activity, as testified to by Dafcik and Vance and not in July as testified to by Schwartz.⁹

Having found that the General Counsel has supported its case with respect to the timing of that announcement the question remains whether or not its contents amounted to a promise of benefits having the tendency to interfere with employees organizational rights. Improvements in such basic terms and conditions of employment as holidays and profit sharing in the midst of an organizing campaign have long been acknowledged as violations of Section 8(a) (1) of the Act absent some legitimate explanation therefore. *N.L.R.B. v. Pyne Molding Corp.*, 226 F.2d 818, 820-21 (2d Cir. 1955). Inasmuch as Respondent argues that the grant of new holidays was announced in July, a defense I have rejected, it does not, nor could it, argue that such benefits were in preparation prior to the advent of the Union and would have been granted notwithstanding that activity. There being no other defense offered with respect to this benefit, it follows

⁹ However, there is insufficient basis for holding that it was posted after the filing of the petition.

that the grant of such benefit in September 1978 had the impermissible tendency to interfere with the organizational activity of the employees and thus violated Section 8(a)(1).

The announcement regarding the institution of the profit sharing plan, however, poses different considerations, for it is Respondent's contention that even if this benefit was announced subsequent to the Union activity, it had been in the planning stages long before then, and consequently was privileged. This argument also is advanced with respect to certain statements admittedly made by Schwartz at two employee meetings conducted prior to the election. The first meeting was held about two weeks before the election and the second meeting was two days before, for the conceded purpose of persuading employees they already enjoyed good benefits. Schwartz testified that he had been thoroughly coached by counsel to inform employees of existing benefits and that he "could not offer anything other than that." Thus, he told employees that they had a blue cross and blue shield policy, life insurance, and that work had been started on a profit sharing plan in the summer and "was being worked on at the time." He explained the difference between profit sharing and pension and the accounting procedure involved in making the plan effective. He testified further that a profit sharing plan was put into effect before the end of 1978 and that a pension plan has never been granted. Neither the plan, nor any of the documents leading to its approval were offered in evidence. Since this announcement clearly was timed to coincide with the election, Respondent's defense that it merely was part of a listing of existing, or pre-planned benefits, requires resolution even if the notice was posted in July. To support this defense Respondent points to the following.

According to Schwartz, pursuant to advice from Collins, a survey was conducted of employees to obtain such census type information as age, beneficiary information, and social security coverage, etc. To accomplish this, a form dated June 20, 1978, was filled out by employees at about that time. However, apart from that employee form, and the June 30, 1978, letter from Collins, Schwartz's testimony concerning the efforts undertaken to institute a profit sharing plan was extremely vague and uncertain. Schwartz did not specify a single date for any specific event in the ongoing process of planning and devising a profit sharing plan for employees (the absence of pertinent records is noted above). Nor did Schwartz refute the testimony of various employees that other than the census information obtained in June and the brief mention in the notice, they never were informed in any respect whatsoever that a profit sharing plan would be instituted until the meetings prior to the election. Even if Schwartz is credited that employees were informed at the time of the survey that the information was being obtained as a step in instituting a profit sharing plan, Respondent's own evidence makes it clear that in June 1978, it had no idea what form of benefit, if any, would be granted. Schwartz himself described the census information as "one of the first things I have to do" and at the very most he informed the employees "we were in the process of putting together this profit sharing or pension plan which ever was more advisable and that I needed this census information for the company." The only notifications to employees thereafter is what appears in the notice be it in July or September, 1978, and that was stated at the pre-election meetings in November.

Yet, Respondent contends that the decision to institute the profit sharing benefit was made prior to any knowledge of Union activity, i.e., September 1978. If that was the case, however, Respondent had almost a three month period in which it could have informed employees of its decision, including the particulars of the plan, pursuant to the promise made in the September notice.¹⁰ Not only did it not do so, it has not so much as suggested a business reason for delaying the announcement of the plan until the pre-election meeting, or why it could not have further delayed such announcement until after the election. In view of the foregoing, I conclude that Respondent has failed to prove by convincing, credible evidence that the profit sharing benefit as instituted in December 1978, was decided upon prior to its knowledge of the union organizing campaign in September 1978, or that the benefit came into existence prior to the announcement in November.¹¹

Respondent also argues that no matter when the final decision was made, it legally was entitled to announce it at the pre-election meeting because clearly a benefit of the same type had been under consideration since June 1978 or earlier. In support of this contention, Respondent relies primarily on *Domino of California*, 205 NLRB 1083 (1973), and *Mr. Fine, Inc.*, 212 NLRB 399 (1974).¹² The first case is fact-

¹⁰ If the notice was posted in July as Respondent contends, it kept its silence to employees for six months, a rather odd procedure which Respondent did not seek to explain.

¹¹ At the pre-election meeting, it will be recalled, Schwartz stated the plan was "being worked on."

¹² Although Respondent asserts it was the profit sharing benefit that eventually was granted which had been under

ually distinguishable from the matter at hand inasmuch as the announcement of insurance coverage there merely revealed the existence of a benefit already enjoyed by employees even though they had not been made aware of it. Here, of course, the employees at the time of the announcement enjoyed no such coverage. The second case also is factually inapposite. Although the employer announced a profit sharing plan during the union campaign, no violation was found because the plan had been conceived, refined, prepared, adopted, and submitted to the Internal Revenue Service (IRS) for approval prior to the organizational activities. It further was found that the announcement to employees was made shortly after approval was granted by (IRS) and was linked to that event. Thus the timing of the announcement was held to be innocent, particularly inasmuch as it was not coupled with any suggestion that similar benefits could not be provided through a union. As found above, the record is absolutely silent as to the sequence of events dealing with the preparation, submission and adoption of the profit sharing plan in its final forms and as found below, the unmistakable message conveyed at the meetings was that the employees did not require a union to enjoy improved benefits.

The grant or promise of new benefits during an election campaign has long been forbidden. "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source

consideration since June, that is so clearly erroneous that I have considered this argument as reaching the actual circumstance of this case.

from which future benefits, must flow and which may dry up if it is not obliged." *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Not all grants or announcements thereof during an election campaign *per se* are unlawful, however. Rather the test is whether or not the employer has proceeded as he normally would have done if the union had not been on the scene. *The Gates Rubber Company*, 182 NLRB 95 (1970). If under all the circumstances it can be reasonably concluded that the employer's conduct, be it the actual grant of benefits or an announcement of new benefits, is not pursuant to normal practices and procedures but rather is related to the union activity of its employees, then it can be said that such conduct is calculated to interfere with the rights of employees to engage in such organization activity. I am convinced that the announcement of the profit sharing plan in the September 1978 notice and the November 1978 meetings were not announcements that would have been made absent the Union activity at the time. Not only has Respondent not linked the announcement to any factor inherent in the plan itself, Schwartz's speech in November was an open effort to persuade the employees to vote against the Union in the upcoming election. The linkage of the announcement of the profit sharing plan to the election, and not to any outside occurrence beyond the Employer's control, is inescapable. I find therefore, that by its promise of a profit sharing plan in the September notice and by the announcement of such plan during the course of the speech in which it was seeking to induce its employees to reject the Union, Respondent violated Section 8(a)(1), regardless of when it internally began to give thought to such a plan or when it undertook the preliminary measures demonstrated

on this record. *American Freightways Co., Inc.*, 124 NLRB 146 (1959).¹³

Respondent's lack of innocence in pre-election campaigning is further evidenced by a notice it posted to employees on January 24, 1980, during the pendency of these proceedings at which time the possibility of the second election existed. In that announcement Respondent states:

In our continuing effort to improve working conditions, plant safety, and employee-company relationships, we are pleased to announce the formation of an "Employees' Communication Committee."

This committee will be made up of three members of the general work force who will meet with company management to explore the above mentioned categories.

In order to get started, three employees will be appointed for the first meeting. They will then set up the mechanics for future meetings and how to select members so that everyone gets a chance to participate.

It is important that everyone get involved—we want to maintain our leadership in the industry not only in production but in aggressive management.

¹³ Even if Respondent had posted the notice in July, the evidence would still support my finding a violation in November. It is clear that from the date of posting until the announcement at the pre-election meeting, employees were not informed in any respect of the progress of Respondent's intent to implement such a plan. As discussed above, the evidence fails to disclose that Respondent engaged in any such activities beyond the initial steps taken in June.

The announcement was over the name of William A. Schwartz, President. General Counsel expressly disclaimed a violation by the posting of this announcement and stated that it was introduced only for the purpose of showing Respondent's animus towards the Union. Respondent objected to its introduction in evidence on the grounds that it was remote to any of the issues in the proceedings. In view of the General Counsel's express disclaimer, I do not consider the matter to have been fully litigated and thus a finding of violation may not be based upon it. Nevertheless, it does disclose an attitude by Respondent incompatible with the Act. This notice is an invitation to employees to form their own in-house union and is a patent and glaring attempt to solicit grievances and offer benefits through discussions with such group which only could have the foreseeable effect of inducing employees to repudiate the Union. Such conduct normally is viewed as a violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Standard Coil Products Co.*, 224 F.2d 465, 466 (1st Cir. 1955) cert. denied, 350 U.S. 902. The fact that this announcement was made just prior to the very trial of this matter involving as one of its questions the propriety of the first election and requiring a determination as to whether or not a second election should be conducted because of Respondent's misconduct, hardly makes such new conduct remote. It long has been established that an employer is barred from engaging in conduct designed to improperly influence his employees' choice in a representation election, whether it is the initial election or during the period when the objections are pending since the holding of a second election is a possibility. *General Teamsters and Allied Workers Local Union No. 992 v. N.L.R.B.*, 427 F.2d 582, 586 (D.C. Cir. 1970).

General Counsel also alleges that at the pre-election meetings Schwartz promised additional benefits and threatened reprisals. In support of these allegations testimony was adduced from Vance, Nagy,¹⁴ Friewald and Dafcik. The only item upon which these witnesses are in agreement is that Schwartz asked the employees for time and to give the Company a chance.¹⁵ Beyond that, their testimony either is vague and uncertain, uncorroborated, or in conflict. Thus, Vance and Nagy are the only ones who had a vague recall of a promise of better wages; Vance, Nagy and Friewald recalled a promise of additional holidays but Dafcik remembered that the reference was to holidays already added (those instituted in the September notice);¹⁶ all but Nagy recalled a clear future promise of a profit sharing benefit;¹⁷ Nagy and Vance testified to a promise of a pension plan although the latter's pre-trial affidavit mentioned only stock benefits; only Vance and Friewald testified to a promise of a dental plan and the latter's pre-trial affidavit mentioned only a promise of profit sharing; and Friewald alone recalled a statement, essentially retracted on cross-examination, to the effect that unionization could result in a decline of business as happened at another firm. While these witnesses may have believed their testimony was accurate, I hold that their recollections

¹⁴ Nagy alone attended both meetings.

¹⁵ The Company had relocated to its present location in March 1978 and apparently underwent an expansion.

¹⁶ This comports with the testimony of Mark Manik, Respondent's witness.

¹⁷ Schwartz and employee Max Cohen, also called by Respondent, testified that profit sharing was referred to as a benefit that the Company then was working on.

with regard to these meetings are not sufficiently reliable so as to predicate findings based thereon that General Counsel has supported with sufficient, probative, evidence the allegations that Respondent, at these meetings, promised improvements in benefits in the areas of wages, pension, dental plan, and stocks and threatened economic reprisals. His comments regarding the profit sharing plan have been dealt with above. Concerning new holidays, as I have found above that these were granted after the Union campaign for the purpose of thwarting that endeavor, the reiteration of that promise in the context described is as unlawful as the initial announcement.

I do credit, however, that Schwartz made remarks, the sum and substance of which were that if the Company was allowed to grow as a business it would remain competitive in wages and working conditions.¹⁸ Although both Dafeik and Nagy testified that Schwartz said benefits would be granted whether or not the Union won the election, the tenor of his remarks, e.g., needing time to grow, a listing of the benefits already enjoyed, etc., was that the Company could and would improve benefits without a union. I certainly do not view Schwartz's speech as urging a vote for the Union and I would be surprised if Schwartz thought that it was. But these credited remarks of Schwartz, while perhaps suggesting a promise of benefits to forego union activity, are expressions of opinion protected by Section 8(c) of the Act. *Gerry's I.G.A.*, 238 NLRB 1141, 1153 (1978);

¹⁸ Aside from the testimony of the four General Counsel Witnesses, Manik and Cohen also testified that Schwartz, while not promising anything, did say the Company would remain competitive in these areas.

Tommy's Spanish Foods Inc., 187 NLRB 235, 236 (1970).

B. The discharge of Robert Nagy

Robert Nagy worked as a driver for the Respondent from September 1977, until his discharge on March 2, 1979, at which time he was the second most senior driver. He was active in the Union campaign from its inception and in time became a leading figure if not the prime mover in the organizational campaign. He met on numerous occasions with Union organizers at his home and at restaurants, he solicited cards from employees around the plant premises, served on an employee organizing committee, and together with Dafcik spearheaded the Union activities. As found above, Nagy and Dafcik were accused by Swerdlick of having passed out Union cards in the parking lot. In addition, Nagy credibly testified that shortly before that incident, Swerdlick asked him, one morning as he was preparing his truck, if he was feeling well. When Nagy replied affirmatively, Swerdlick commented to the effect there was a "Union fever" which had not been cured. Nagy protested that he was not involved, to which Swerdlick replied that everyone was involved. This interrogation constitutes an additional Section 8(a)(1) violation. Also, as found above, Nagy and Dafcik were confronted by Swerdlick on another occasion in the men's room about their Union activity. Therefore, it is perfectly clear on this record that not only was Nagy actively involved in the Union organizing campaign but that Respondent was well aware of that activity, at least from September 1978, and was displeased by it.

On February 27, 1979, Nagy was told by the Respondent (either by Schwartz or William Bostick, shipping manager, and an admitted supervisor of the

drivers), that he was being suspended pending an investigation for theft.¹⁹ On Friday, March 2, 1979, Nagy was fired by Schwartz. The complaint states it was March 3 and Nagy placed it on that date. However, Nagy was not certain of dates generally or of this date in particular and so I find that Schwartz, who was certain of the date and presumably checked Company records, is correct. In any event, it is undisputed that Schwartz told Nagy he was being fired for stealing materials from the Respondent. At the hearing, Schwartz testified that the only reason for the discharge was Nagy's theft of Respondent's windows and his theft of a drop light from a job site where Nagy had made deliveries on February 26. However, at the hearing counsel for Respondent asserted that there were numerous reasons for the discharge although they had not previously been made known.²⁰ These reasons included: (1) helping other employees steal materials; (2) submitting false gas receipts for reimbursement by the Company; (3) offering gas station attendants marijuana cigarettes in return for false gas receipts; (4) threatening to pound Bostick's head in the snow; (5) planning to have Bostick's legs broken by someone else; (6) smoking marijuana while driving the Company truck. In

¹⁹ Nagy believed he was so informed by Schwartz. Schwartz and Bostick testified that although Schwartz authorized the suspension Bostick actually communicated this to Nagy. I do not consider this to be a critical area of dispute and find it unnecessary to resolve this conflict.

²⁰ Counsel raised these defenses during the course of Nagy's cross-examination when he asked questions about a series of alleged misdeeds. Counsel assured the judge that each and every item alluded to constituted one of the reasons for Nagy's discharge and that proof would be presented on all of them.

his brief, counsel abandoned these six allegations and, consistent with Schwartz's testimony, states that Nagy was discharged for theft. Alternatively Respondent argues that at the very least, Respondent had reasonable basis for believing that Nagy was a thief.²¹

Before considering Respondent's defense, the initial inquiry under the Board's *Wright Line* test²² is whether or not the General Counsel has made a *prima facie* showing to support an inference that Nagy's protected conduct was a motivating factor in his discharge. In my opinion there is substantial evidence on this record to support such a finding. Nagy was a vocal and active Union supporter who distributed Union cards and literature to employees at the plant, Union meetings were conducted in his home, and it was he, together with Dafcik, who led the employee organizing drive for the longest period of time. His Union activity was known to Respondent at least since early September 1978, as evidenced by Swerdlick's coercive remarks made directly to Nagy and Dafcik

²¹ It appears that the various other misdeeds catalogued above now are relied upon by Respondent to demonstrate that inasmuch as it had a legitimate basis many times for discharging Nagy in the past and did not do so, it follows that when it finally discharged him for "theft" it was motivated solely by that last misdeed and not by his Union activity. This argument will be discussed below. It is noted though, that during Bostick's direct examination, counsel specifically disclaimed item four as a reason for discharge and stated that it was introduced for credibility purposes only. Similarly, while adducing testimony from Rizzo on direct examination regarding item two, counsel disclaimed that as a reason for discharge, asserting that such testimony also was introduced for credibility purposes. Nagy denied all six allegations.

²² *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980).

seeking to dissuade them from their Union activity. In addition, Respondent has demonstrated, by various acts and conduct in violation of Section 8(a) (1), that it was hostile to the Union activity of its employees and more particularly blamed Nagy in part for that activity. Respondent argues that because the discharge came some four months after the filing of the petition and more than three months after the election, it was remote in time from the Union activity and therefore militates against a violation. This argument fails to recognize that another election was likely inasmuch as objections were pending which could be resolved only after a hearing.²³ Thus, timing is a significant element in concluding that Union activity was a factor in the discharge. If there be any doubt, it is resolved by Schwartz who testified that Nagy's Union activity was a matter of concern to the Respondent in considering whether or not he should be discharged and for that reason counsel's advice was sought. As Schwartz put it, he was "very sensitive to the position we were now in after the certification election."

In view of Schwartz's testimony that the only reasons for the discharge were Nagy's theft of a drop

²³ On January 17, 1979, the Acting Regional Director, Region 22, issued a "Report On Challenged Ballots and Objections" in which, *inter alia*, he recommended that a hearing be conducted on the objections and that it be consolidated with the hearing to be held on the unfair labor practice complaint which would issue in Case No. 22-CA-8800 because both matters had substantial issues in common. Therefore, unless Respondent was willing to settle the unfair labor practices and consent to a second election it knew that a hearing would be conducted and a second election might be ordered. In any event, the election proceeding was a very live issue at the time of the discharge.

light belonging to a contractor and windows belonging to the Respondent, and in view of the post hearing brief adopting these reasons, I shall turn to the allegations of theft in order to decide whether Respondent has established its primary defense, namely that Nagy was a thief, or alternatively that it had reason to believe so. The triggering events which Respondent bases its defense upon begin on February 26, 1979, when according to Bostick he received a telephone call from a contractor at a job site where Respondent had made a delivery that day complaining that a drop light (a light bulb at the end of a long electric cord) had been stolen by one of Respondent's drivers.²⁴ Bostick ascertained that the delivery had been made by Nagy, accompanied by a helper Casimar Volosyn. Later that afternoon Bostick spoke to Volosyn on the telephone who said that he could not talk because Nagy was close at hand. The next morning when Volosyn arrived at work Bostick renewed the discussion. He asked Volosyn what he knew about a missing drop light and when Volosyn allegedly told him that Nagy had stolen it, he immediately reported the incident to Schwartz. Bostick and Schwartz testified that it was decided Nagy should be suspended pending an investigation of the theft of the drop light which as noted above, was done.

Schwartz testified he immediately telephoned counsel for advise on how to proceed because of his con-

²⁴ All conversations between Bostick and Schwartz, on the one hand, and the alleged contractor from whom the drop light allegedly was stolen, and other persons allegedly witnessing thefts, on the other hand, were received in evidence solely for state of mind purposes and not to establish any "theft" or other "fact" allegedly asserted by said contractor and others.

cern regarding the election matter. On counsel's advice that he obtain a sworn statement, Volosyn was interviewed by Schwartz and a statement typed by Schwartz's secretary and sworn to by Volosyn. In it, Volosyn swore that at a job site in East Brunswick, New Jersey, he "witnessed the theft of an electrical drop light with approximately 20-25 feet of extension line. The drop light was taken by Robert Nagy the driver for Blackstone Company, Inc., from the premises of 322 Jefferson Avenue, North Plainfield, New Jersey on the north side of State Highway 22." He further stated that they were there to deliver a door unit for Del Cap Builders Inc.²⁵ At the hearing Volosyn testified that he was interviewed by Schwartz but could not recall who actually prepared his statement. He further testified he did not actually see Nagy take a light, as asserted in his affidavit, and what actually happened is as follows. After the delivery had been made Nagy, with Volosyn at his side, drove the truck off the job site and stopped about a thousand feet down the road. Nagy stepped out of the truck, reached in back of the driver's seat from where he produced a drop light, and said "I want to show you this." Volosyn asked where he had gotten it to which Nagy replied he had taken it from the job site. Volosyn could not explain why his sworn statement to Schwartz states that he witnessed the theft and why it did not describe the actual occurrence as testified to at trial. However, Volosyn testified that the version at trial was the version given to Schwartz, a communications failure not explained by Schwartz either. Volosyn further testified that later that same

²⁵ Del Cap was Blackstone's customer. The drop light allegedly was owned by some other contractor on that job site.

day, Nagy was in the process of stealing a pump from a job site when Volosyn called to his attention the fact they were being observed, at which point Nagy returned the pump. Volosyn also testified that on a number of earlier occasions Nagy had expressed to him an intent to steal other materials but refrained from doing so because Volosyn was opposed and told Nagy that he (Volosyn) did not want to know about such things and did not want to get involved. There is no testimony that Volosyn informed Bostick or Schwartz, on February 27, of these additional attempted theft's. Nagy categorically denied that he stole a drop light, that he showed a drop light to Volosyn, that he spoke to him about a drop light, that he attempted to steal a pump, or that on other occasions he had expressed a desire to steal.

On February 28, 1979, Schwartz obtained another sworn statement from employee Jeffrey Prell asserting that on January 24, 1979, while working as a helper for Nagy, he witnessed Nagy steal twelve pieces of lumber, two feet by four feet, and transport them to his home where he unloaded them into the basement at which time Nagy pointed out a large supply of windows which he admitted he had taken from Respondent at different times. Prell testified that he reported the theft to a fellow worker, Jeffrey Barkaszi, who in turn told Bostick, and that it was Bostick who, on February 28, asked him to sign the statement for Schwartz. Prell's explanation was not corroborated by Bostick who testified that the reason he requested a statement from Prell was that Volosyn had informed him that both Prell and Barkaszi had information to offer concerning Nagy's thefts, an assertion not supported by Volosyn. For that reason Bostick stated, he asked Prell to see Schwartz on

February 28, and asked Barkaszi to meet with Schwartz on March 2. Barkaszi, however, corroborated neither explanation. He testified that somehow he heard Volosyn had given an affidavit to the Company which prompted him to volunteer his own statement. He denied that Bostick requested the affidavit or that he had even spoken to Bostick about the information contained in it. Barkaszi portrayed himself, Prell and Volosyn as a group opposed in some way by a group consisting of Nagy, Dafcik and Friewald.

In Barkaszi's affidavit given to Schwartz on March 2, 1979 he states that in late January 1979, Nagy admitted to him that "he had been removing materials and equipment from job sites," and "removing windows from the Blackstone plant for his own use." Further, while at Nagy's house he was shown a supply of cinder blocks and a wheel barrow which Nagy had removed from job sites. In addition, Barkaszi states that Nagy informed him he would begin removing doors from Blackstone for his personal use. Finally, the Barkaszi affidavit states that on February 14, 1979, he observed Nagy ask for a false gas receipt in the value of \$20.00 at a Hess gasoline station in exchange for a marijuana cigarette. Nagy denied all of Barkaszi's assertions of wrong doing.

Backtracking a bit, upon the suspension of Nagy, Schwartz pursued the investigation by notifying the East Brunswick, New Jersey police department of the allegations against Nagy and gave that organization the Prell and Volosyn affidavits. Detective John Soke of the East Brunswick police department, who referred to his official file while testifying, and whose testimony is fully credited, stated that upon a com-

plaint made by Schwartz, supported solely by the two employee statements, he conducted an investigation.²⁶ Without prior notice, he and another detective visited Nagy at his home on March 2, 1979, and advised him of the nature of the complaint. Nagy readily consented to their request to search his home notwithstanding that no warrant was produced, or that Nagy had not consulted an attorney. The detectives searched the basement and did not find any of the allegedly stolen items, i.e., a drop light, windows, cinder blocks or lumber. Soke did notice a few odd pieces of lumber which had been cut from larger pieces and asked Nagy how he had obtained them. Nagy replied he had removed them from construction sites with permission of the job superintendent. Detective Soke told Nagy he would like to continue the investigation at police headquarters and as a consequence Nagy visited the station later that day where he was shown, for the first time, the Volosyn and Prell affidavits. Nagy denied any knowledge of the thefts attributed to him in those statements and could not explain why the two individuals would have made such statements accusing him. He did express the belief, however, that Respondent had lodged a complaint because of his Union activity. Nagy consented to a lie detector test, but a few days later when Soke phoned to arrange for the test Nagy declined, stating he had been fired in the interim and thus saw no reason to continue with the investigation. In all material respects, Soke's testimony is confirmed by Nagy.

Soke also testified he telephoned Schwartz periodically to advise of the progress of the investigation

²⁶ Schwartz testified he told Soke all he knew about the drop light. If by that, Schwartz meant to imply he reported the information allegedly given by the contractor, it is not credited.

and that he made a final report to Schwartz that the investigation had failed to uncover any proof of theft and that none of the allegedly stolen property was found in Nagy's residence. He further advised Schwartz that he could pursue the matter with a formal complaint but as far as the police authorities were concerned, the case was closed because there was no evidence to support a finding of reasonable cause to believe Nagy engaged in theft. He also informed Schwartz that because certain of the alleged thefts occurred outside the jurisdiction of the East Brunswick police, Schwartz could refer the matters to the police departments having jurisdiction.²⁷ Schwartz was not certain of the date he received Soke's final report, but nevertheless on March 2, 1979, Schwartz fired Nagy informing him that the reason was his theft of windows from Respondent. Schwartz also testified that Nagy offered to return the windows in return for a promise not to prosecute, an exchange denied by Nagy. I do not credit Schwartz particularly as it would have been highly unlikely for Nagy, who had already undergone police investigation at which no stolen items were recovered, to have made such an offer.

It is my opinion that on this record Respondent has failed to support its derense that Nagy was a thief or that it was reasonable to have such belief. The defense rests exclusively on the alleged admissions made by Nagy to Volosyn, Prell, and Barkaszi, admissions which Nagy denied. There is no independent evidence supporting the various allegations, and indeed there is no convincing evidence that anything at all was stolen, let alone by Nagy. Thus, although the major "theft," i.e., the only one mentioned in the exit inter-

²⁷ Schwartz did not pursue Soke's suggestion.

view, involved Respondent's windows, Respondent made no effort to demonstrate that such items actually were removed without authorization, either from its plant or from customers. Surely, a "large supply" of missing windows (Prell's language) would have been noticed by Respondent if taken from the plant, or if stolen from job sites there would have been a need to re-supply the customer. With respect to the case of the drop light there is no evidence that such a light was stolen or that such a light even existed, again apart from Nagy's alleged admission. Although it allegedly was stolen from an electrical contractor neither Bostick nor Schwartz could readily recall the name of the contractor, and although Schwartz claimed to have received a \$13.94 bill from the contractor for the light and to have paid it, no convincing records were introduced to establish these facts. And finally the failure to call the contractor, or explain such failure, to establish the fact of a stolen light and the report thereof to Respondent, under all the circumstances, is a serious weakness in Respondent's case.²⁸ While it is doubtful that such evidence would have been conclusive on the issue of Nagy's guilt, it clearly would have been circumstantially significant.

This brings us then to the reliability of the admissions and the clear and direct conflict in credibility that exists between Nagy on the one hand and Prell, Volosyn and Barkaszi on the other. For many reasons, including the improbability that Nagy would jeopardize not only his livelihood but his very freedom, by gratuitously admitting a series of thefts to three

²⁸ Respondent specifically declined General Counsel's request during the course of the hearing to produce the contractor.

individuals, who if not antagonistic certainly were not friends of his, I credit Nagy that he did not steal the items attributed to him, and did not make such admissions of theft to Prell, Barkaszi and Volosyn. This particularly is true in Volosyn's case where by his own testimony, he previously had warned Nagy not to involve him in illegal conduct. However, such finding does not put an end to Respondent's defense because it also contends that even if Nagy did not steal it acted on a good-faith belief that he did. While it is true that such defense would, under proper circumstances, rebut General Counsel's *prima facie* case, I conclude here that Respondent could not have formed such a good-faith belief. Rather, its entire course of conduct demonstrates a determination to rid itself of a vocal Union adherent by reliance on a flimsy and transparent house-of-cards which does not withstand close scrutiny.

The failure of Respondent to support its essential claim that there were indeed missing items is but one of the missing links. An even more glaring gap in the Respondent's entire defense is its own actions at the time Nagy was suspended. He was told quite clearly that he was suspended pending investigation of theft. At the time it already had the Prell and Volosyn affidavits and Barkaszi's was not obtained until the day of discharge. The only further investigation thus undertaken was to call in the East Brunswick police department, on surface a very prudent act. Yet that very investigation which Respondent said it would await before acting on the discharge, established no basis for believing that Nagy had stolen and in fact exonerated him. Armed with that knowledge, and while declining to pursue the matter further with the police although invited to do so, Respondent then discharged Nagy based on no more

damaging information than it had prior to conducting the investigation. The obvious question then is, why suspend Nagy pending an investigation which is to be ignored? The answer, inferable from the evidence, is that Respondent merely was seeking to create an air of legitimacy to its predetermined decision. My conclusion is not effected by the implication in Schwartz's testimony that he may not have received Detective Soke's final report until after March 2. If that be true then Schwartz stands in a harsher light for having acted in the middle of an investigation which he had initiated. Either way, the investigation was instituted by Schwartz without a genuine desire to abide by the findings.

The defense of a reasonable belief that Nagy stole is further invalidated upon examination of the circumstances surrounding the contents of, and the way in which three affidavits were secured. Volosyn testified he told Schwartz his knowledge of Nagy's theft came from the asserted admission by Nagy. Nevertheless, Schwartz prepared an affidavit for Volosyn asserting that the latter had actually witnessed Nagy steal. One need not be Sam Spade to know the damaging effect of an eyewitness account as opposed to the vagaries inherent in a "confession." Again, I believe that this was part of Respondent's effort to buttress an insufficient defense. Additionally, it seems apparent from the confused and conflicting versions given by Bostick, Prell, Volosyn and Barkaszi as to the circumstances under which each was requested or volunteered the information that Respondent's pose as an innocent receiver of incriminating information cannot be accepted at face value.²⁹

²⁹ I have considered the doubtful veracity of Respondent's case expressed here in crediting Nagy over Volosyn, Prell

In reaching these conclusions, I find it unnecessary to consider why the three employees acted as they did or what response, if any, their actions generated in Nagy, Dafcik, and Friewald, matters that were the subjects of considerable conflicting testimony in their own right.³⁰

In sum, Respondent seeks to justify its discharge of Nagy by seizing upon transparently unreliable evidence while simultaneously ignoring the most reliable evidence presented to it, namely the police department report. When this is coupled with its failure to afford to Nagy the same opportunity to clear himself by sworn affidavit as was given to his accusers, and in consideration of the shifting reasons for discharging Nagy as detailed above, I cannot accept that Respondent would have discharged Nagy in the absence of his protected activity.³¹ Therefore, I con-

and Barkaszi regarding the alleged admissions as discussed above.

³⁰ It is of passing interest to note that Volosyn was made foreman and then supervisor with a substantial raise in pay shortly after he gave his affidavit to Schwartz.

³¹ Shifting reasons are well recognized as important factors in determining motive in Section 8(a) (3) cases. *Russ Togs, Inc.*, 253 NLRB No. 99 (1980). In light of Respondent's final position on the reason for the discharge it is unnecessary to decide if Nagy committed any or all of the six additional allegations of wrongdoing itemized above. Nor are these allegations relevant to Respondent's argument, a tenuous one at best, that the failure to discharge Nagy earlier proves an innocent motive later. That argument is built on quicksand because there absolutely is no showing that such offenses, singly or in any combination thereof, automatically would have resulted in discharge. That they probably did not invariably result in discharge is suggested by the equivocation

clude that the discharge of Nagy was in violation of Section 8(a)(3) and (1) of the Act.

The Discharge of Kevin Moffat

Moffat was hired by Respondent on August 21, 1978, as a driver at \$4.00 a hour and one week after he received a raise to \$4.50 per hour. On September 21, 1978, Bostick fired him telling him that he was being laid off for lack of work. Moffat attended the Union meeting at McDonald's on September 8, 1978, where he signed a Union pledge card. As more fully described above, Respondent learned of Moffat's Union activity, Swerdlick accused him of joining the Union, threatened him that unionization would mean a loss of business, and that the newer employees would be fired first. Respondent also concedes that the reason communicated to Moffat for the discharge was not truthful and that the real reason for Moffat's discharge was poor work performance. Although Moffat was not significantly active in the Union organizing campaign he did sign a card and was one of only a handful of employees whom Respondent knew for sure had joined the Union, an act resulting in a direct threat of discharge. These circumstances, when coupled with Respondent's demonstrated hostility towards the Union including its commission of numerous Section 8(a)(1) violations, are more than sufficient to support a *prima facie* holding that Moffat's discharge was in reprisal for his Union activity.

in Respondent's presentation of the case that evidence was offered on two of the items for credibility purposes only. But to mention the problem, i.e., the relative merits of a multitude of shifting defenses, illustrates its scope and the correctness of the aforesaid Board position.

Respondent defends this Section 8(a)(3) allegation on the grounds that Moffat was terminated because of poor work performance. Initially, I consider Respondent's explanation for Bostick having given Moffat a false reason for his discharge, i.e., lack of work. Bostick testified that this was done at the specific request of Moffat in order to permit him to collect unemployment insurance, a claim disputed by Moffat. I am unable to credit Bostick's testimony in this regard. Not only did Moffat impress me as a more credible witness on this point, but I previously have found Bostick's testimony not reliable in other critical areas. Further, I find this particular testimony most unlikely in light of Bostick's concession that it was not his practice to accede to an employee's request for a lay-off when it was not true particularly as he was aware of the fact that such action, which would permit an employee to collect additional unemployment insurance, could have an adverse economic impact on the Company's insurance rate. I am not persuaded that Bostick made an exception for Moffat, something he claimed he did from time-to-time as a whim. Thus, as in Nagy's case, Respondent again has asserted shifting reasons for the discharge of Moffat therefore suggesting that the real reason lies elsewhere. Under the circumstances detailed above, the inference is warranted that the other reason was Moffat's Union activity.

Nor do I find sufficient credible testimony to support Respondent's claim that Moffat was discharged for poor work performance. Bostick testified that his decision to discharge Moffat primarily was based upon reports he received from Prell, Barkaszi and another driver Steven Nemeth each of whom observed Moffat and reported that he was a poor driver and

poor worker. Barkaszi, who began work as a driver for Respondent in May 1978, testified that Moffat had difficulty working as either a helper or a driver, particularly when driving in reverse gear, and that he so informed Bostick, although the record does not disclose when this occurred. Moffat's undenied and credited testimony was that he had worked alongside Barkaszi on many occasions and was not made aware of any particular difficulty in his driving abilities by Barkaszi or Bostick. Moffat did acknowledge experiencing some driving difficulties in the beginning, but I credit his explanation that they were insignificant and of a kind that might befall any new driver.

Prell testified that Moffat worked as his helper in an unsatisfactory manner on a few occasions. However, Prell placed these problems at the very start of Moffat's employment and he made his report to Swerdlick, not Bostick. Swerdlick, on the other hand testified he received reports from Barkaszi and Nemeth. Once again, there is utter confusion in how, and to whom, employees reported on one another. The most compelling evidence supporting Respondent's case is that based upon Nemeth's testimony. Nemeth, a senior driver, testified with some certainty and with credibility that he was asked by Bostick in Moffat's third week of employment to evaluate his driving ability. Nemeth rode with Moffat and advised him that he was being observed. Nemeth concluded that Moffat was a poor driver who used excessive speed considering the weight of the loaded truck. Upon return to the plant, Nemeth told Bostick that Moffat would not make a satisfactory driver or a loader. Despite all of Moffat's shortcomings as a worker, the only incident recorded in Respondent's records relates to an incident late in the

afternoon of September 15, 1970. Moffat admits he was taking a break and had parked the truck in a shopping center when Schwartz happened by. Schwartz testified that he observed the driver, who he did not know by name at the time, drinking soda and not working for about a half hour. It is undisputed he spoke to the driver and told him only that he was due back at the plant. Schwartz contacted Bostick and a note was placed in Moffat's file to the effect that he had taken excessive time on the delivery. Schwartz conceded that at the time he spoke to Moffat he did not reprimand him, he did not consider this a major offense, he did not thereafter discuss this matter with Moffat or with Bostick, and that he played no role in the decision to discharge Moffat. It is clear therefore that this one incident some two weeks prior to the discharge was not the reason for the discharge although Respondent asserts it was a factor in concluding that Moffat could not perform the work. In my opinion, Respondent's reliance on this incident serves only to demonstrate the weakness of its defense.³² Drivers, including Barkaszi and Nemeth, testified that taking a break in the afternoon was common practice, that most drivers considered work after 4:00 pm to be overtime, that although Swerdlick had mentioned his opposition to these breaks a number of times all of the drivers continued to take a late afternoon break and doing so was not considered a major rule violation. Indeed the rule, if it could be called that, was honored more in the breach than in the observance. For example,

³² Respondent clearly could not sustain the lack of work defense which was given to Moffat upon his termination. The Company was expanding and new drivers were constantly being hired, before and after Moffat's termination.

Nemeth who was the most senior driver having four years of service, testified that there was no established Company policy with respect to the number of breaks a driver was permitted to take and that normally all drivers did take two breaks a day. Finally, to demonstrate that Moffat's discharge was not an extraordinary occurrence and was in keeping with legitimate business practice, Respondent points to the large turnover it was experiencing during this time of expansion, and the fact that Bostick fired approximately 10 drivers and 13 warehousemen for poor work performance during the period from about August 1978 through the end of 1979.

Although, Respondent has shown that it had a practice of discharging employees for poor performance, I conclude that it has not sustained its burden of establishing that Moffat fell within that group of poor workers so that he would have been fired in the absence of his having engaged in protected activity. Thus, while Nemeth's report was an unbiased and credible one, its value is diminished by the remaining support to Respondent's case which is unreliable, vague, and suspect, and almost non-existent. Counter balancing the effect of the Nemeth report is the compelling evidence of Respondent's hostility towards the Union, Moffat's involvement in it, and the shifting reasons given for the discharge. It is my conclusion that Respondent utilized the Nemeth evaluation to rid itself of a Union activist in the hope that by discharging a relatively new employee, its discriminatory motive would not become apparent. Accordingly, I conclude that the discharge of Moffat was in violation of Section 8(a)(3) and (1) of the Act.

III. The objections to the election

As already stated, the Union on November 29, 1978, filed timely objections to the election alleging, *inter alia*, that Respondent by Swerdlick unlawfully interrogated employees, an allegation coextensive with certain allegations in the consolidated complaint. It long had been Board policy that the critical period for assessing objectionable conduct falls between the date of the filing of the petition and the holding of the election. In the instant case that period runs from September 28, to November 21, 1978. It has already been found that Respondent committed numerous violations of Section 8(a) (1) in that period consisting of:

(1) Swerdlick's refusal in early October 1978, to consider Dafcik's request for a wage increase until after the Union question was resolved;

(2) Swerdlick's threat to Nagy and Dafcik in the men's room, in early October 1978, to the effect that Respondent would go out of business if the Union was successful;

(3) Swerdlick's interrogation and warning to Friewald in late October 1978, that he was to ignore the Union campaign and stay away from his friends who were active in the Union.

(4) In addition, I have concluded that Schwartz, at the employee meetings in the two weeks prior to the election, unlawfully announced the grant of a profit sharing plan and reinforced his prior unlawful announcement of additional holidays. It follows, that by the foregoing unlawful conduct Respondent also interfered with the election, and it will be recommended therefore that it be set aside. *Playskool Manufacturing Company*, 140 NLRB 1417 (1963).

Of the Union's four objections only the specific allegations of interrogation were coextensive with any allegations in the consolidated complaint. Two objections related to allegations of unlawful discharge of two individuals with respect to whom no Section 8(a)(3) violations have been alleged in the matter before me. Consequently, it is recommended that those two objections be dismissed. The remaining objection alleged that Swerdlick negotiated a private agreement with employees conditioned upon the Union losing the election. This conduct was neither alleged in the consolidated complaint nor litigated before me. Consequently I recommend that this objection be dismissed. With respect to the various Section 8(a)(1) violations enumerated above as forming the basis for invalidating the election, I note that although many of these violations were not specifically asserted by the Union in its objections, it is a longstanding policy of the Board to set aside elections based upon improper conduct even though such conduct was not the subject of a specific objection. See *American Safety Equipment Corporation*, 234 NLRB 501 (1978).

Conclusions of Law

1. Respondent is an employer engaged in commerce and the Union is a labor organization within the meaning of the Act.

2. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by:

(a) Interrogating its employees about their own Union activity and the Union activity of their co-workers.

(b) Creating the impression of surveillance of its employees' Union activities.

(c) Threatening its employees with plant closing, loss of employment and discharge if they engaged in Union activities or supported the Union.

(d) Warning its employees to refrain from Union activities and not to associate with Union members or supporters.

(e) Refusing to consider requests for wage increases because of its employees' Union activities.

(f) Promising profit sharing and additional paid holidays to induce employees not to support the Union.

3. By discriminatorily discharging employees Robert Nagy and Kevin Moffat because of their activities in support of the Union, Respondent has committed unfair labor practices within the meaning of Section 8(a) (3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not engage in unfair labor practices other than those found herein.

6. The Union's objections have been sustained by the evidence and Respondent thereby has interfered with and illegally affected the results of the Board election held on November 21, 1978.

The Remedy

Having found that Respondent engaged in certain unfair labor practices it shall be recommended that it cease and desist therefrom or from engaging in any like or related conduct and that it take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent discharged Robert Nagy and Kevin Moffat in violation of Section 8(a) (3) and (1) of the Act, I shall rec-

commend that Respondent be ordered to offer them full and immediate reinstatement to their former jobs, or if these jobs no longer exist to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings they may have suffered from the date of their respective discharges to the date of Respondent's offers of reinstatement. Said loss of earnings shall be computed in the manner set forth by the Board in *F.W. Woolworth Company*, 90 NLRB 289 (1950), together with interest there on as computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).³³ Payroll and other records in possession of Respondent are to be made available to the Board or its agents to assist in such computation. Although the unfair labor practices herein are most serious, the record does not reflect that Respondent has a proclivity to violate the Act or has engaged in such egregious or pervasive misconduct as to warrant a broad remedial order. Accordingly I shall recommend the narrow injunctive language "in any like or related manner." See *Hickmott Foods Inc.*, 242 NLRB No. 177 (1979). Further, having found that the Union's objections have been sustained by the evidence I shall recommend that the election held on November 21, 1978, be set aside and a new election be ordered by the Regional Director as soon as feasible.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section

³³ See generally *Isla Plumbing & Heating Company*, 138 NLRB 716 (1962).

10(c) of the Act, I hereby issue the following recommended: ²⁴

Order

Respondent, Blackstone Company Inc. its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment because of their activities on behalf of Teamsters Local Union No. 35, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union.

(b) Coersively interrogating employees concerning their own Union activity and the Union activity of their co-workers.

(c) Creating the impression that it has the Union activities of employees under surveillance.

(d) Threatening its employees with loss of employment, discharge or plant closing because they engage in Union activity or support the Union.

(e) Warning employees to refrain from Union activities and not to associate with Union members or supporters.

(f) Refusing to consider requests for wage increases because employees engaged in Union activities.

²⁴ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections hereto shall be deemed waived for all purposes.

(g) Promising employees profit sharing and additional paid holidays to induce them not to support the Union.

(h) In any like or related manner interfering with restraining or coercing employees in the exercise of their rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(e) Offer to Robert Nagy and Kevin Moffat immediate and full reinstatement to their former jobs, or if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for lost earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve, and upon request, make available to the Board and its agents, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports and all other records necessary to ascertain the backpay due under the terms of this Order.

(c) Post at its East Brunswick, New Jersey plant, copies of the notice attached hereto marked "Appendix"²⁵ Copies of said notice on forms provided for the Regional Director for Region 22, after being duly signed by the Respondent's authorized representative, shall be posted by it for a period of 60 consecutive

²⁵ In the event the Board's Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

days thereafter in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by said Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director, for Region 22 in writing within 20 days from the date of this order what steps it has taken to comply herewith.

IT FURTHER IS RECOMMENDED that the consolidated amended complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

IT FURTHER IS RECOMMENDED that the Board sustain the objections to the election conducted on November 21, 1978, in Case No. 22-RC-7657 and order that a new election be conducted. That said case be severed and remanded to the Regional Director of Region 22 for the holding of such an election under the supervision of the said Director as soon as feasible under the circumstances present herein.

Dated, New York, NY, March 27, 1981

/s/ Edwin H. Bennett
EDWIN H. BENNETT
Administrative Law Judge

[SEAL]

[SEAL]

**NOTICE TO
EMPLOYEES****POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD****An Agency of the United States Government**

AFTER A TRIAL IN WHICH ALL PARTIES PARTICIPATED AND WERE AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THEIR RESPECTIVE POSITIONS, IT HAS BEEN FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS AND WE HAVE BEEN ORDERED TO POST THIS NOTICE AND TO CARRY OUT ITS TERMS.

The National Labor Relations Act, gives you, as employees, certain rights including the right:

- To engage in self organization;**
- To form, join, or help a union;**
- To bargain collectively through a representative of your own choosing;**
- To act together for collective bargaining or other mutual aid or protection; and**
- To refrain from any or all of these things.**

Accordingly, we give you these assurances

WE WILL NOT discharge, lay off, or otherwise discriminate against our employees because they join or support Teamsters Local Union No. 35, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any other labor organization.

WE WILL NOT coercively interrogate our employees about their union activities or beliefs.

WE WILL NOT create the impression that we have the union activities of our employees under surveillance.

WE WILL NOT threaten our employees with loss of employment, discharge or plant closure because of their union activities or beliefs.

We WILL NOT warn our employees to refrain from union activities and not to associate with union members or supporters.

WE WILL NOT refuse to consider requests for wage increases because employees engage in union activities.

WE WILL NOT promise our employees profit sharing and additional paid holidays to induce them not to support a union.

WE WILL NOT in any like or related manner interfere with, refrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer to Robert Nagy and Kevin Moffat immediate and full reinstatement to their former positions, and if such positions no longer exist to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE SHALL make them whole for any loss of pay they may have suffered by reason of our unlawful discrimination against them, with interest.

The election held on November 21, 1978, by the National Labor Relations Board, has been set aside and its results voided because of our unlawful con-

77a

duct affecting the outcome of that election, as found by the Board, during the period preceding that election. In due time, another election will be held, and you will be notified of the date, time and place.

BLACKSTONE COMPANY, INC.
(Employer)

Dated By
(Representative) (Title)

**THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino, Jr. Federal Building—Room 1600, 970 Broad Street, Newark, New Jersey 07102 Telephone No. (201) 645-3652

MAR 22 1983

ALEXANDER L. STEVENS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BLACKSTONE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Third Circuit

**MEMORANDUM FOR BLACKSTONE COMPANY
IN OPPOSITION**

THEODORE M. EISENBERG,
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65 Livingston Avenue,
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(201) 992-4800

*Counsel for Respondent, Blackstone
Company.*

JOSEPH P. PARANAG,
On the Memorandum.

NO. 82-1105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BLACKSTONE COMPANY,

Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Third Circuit**

**MEMORANDUM FOR BLACKSTONE COMPANY
IN OPPOSITION**

Blackstone Company opposes the granting of the National Labor Relations Board's petition for a writ of certiorari because the Board: (1) misstates the question presented to the Court, and (2) asks the Court to decide this case on the facts of a markedly different and less compelling case, *NLRB v. Transportation Management Corp.*, No. 82-168.

The Board frames the question presented as follows:

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), *if its hostility to an employee's protected union activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee*, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities. (Emphasis added).

The Board's statement of the question presented incorrectly presumes that General Counsel has established an illicit motivation for discharge by a "preponderance of the evidence." However, *Wright Line* does not require that General Counsel bear such a substantial initial burden. Rather, General Counsel merely has the burden of making a "*prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line, A Division of Wright Line Inc.*, 251 NLRB 1083, 1089 (1980).

The distinction between General Counsel's initial burden of proof under *Wright Line* and the Solicitor General's characterization of that burden is significant, in view of the burden of persuasion which *Wright Line* then shifts to the employer. If the employer fails to meet that burden, General Counsel does not retain the ultimate burden to prove a violation by a preponderance of the evidence. To the contrary, under *Wright Line* the violation is then deemed proven based upon the initial *prima facie* showing. Indeed, the fundamental difficulty with the *Wright Line* test is that General Counsel is never required to affirmatively prove a violation by a preponderance of the

evidence.¹ Thus, by incorporating the “preponderance of the evidence” standard into General Counsel’s initial burden of going forward, the Solicitor General attempts to remedy a fatal defect in the *Wright Line* test.

As set forth in Blackstone’s cross-petition for a writ of certiorari, the facts of the case *sub judice* offer the Court a more meaningful context to evaluate the impact of the Board’s burden-shifting approach, due to the weakness of the *prima facie* showing and the strength of the legitimate business reason articulated by the employer. Thus, we respectfully urge the Court to deny the Board’s petition for a writ of certiorari and to grant Blackstone’s cross-petition in case No. 82-1305.

Respectfully submitted,

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(201) 992-4800

*Counsel for Respondent, Blackstone
Company.*

JOSEPH P. PARANAC,
On the Memorandum.

¹ Moreover, the fallacy of this approach is exacerbated by the Board policy that where:

the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found.